

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

**FREDRICK G. LODWICK**

Claimant

VS.

**WEBSTER ENGINEERING & MANUFACTURING  
COMPANY, INC.**

Respondent

AND

**HARTFORD UNDERWRITERS INSURANCE CO.**

Insurance Carrier

Docket No. 1,030,167

**ORDER**

Respondent and its insurance carrier appealed the November 27, 2006, preliminary hearing Order entered by Administrative Law Judge John D. Clark.

**ISSUES**

Claimant alleges he injured his head, shoulders and upper back on April 21, 2006, when he fell at work while helping to unload scrap steel from a bin. In the November 27, 2006, Order, Judge Clark granted claimant's request for medical treatment. Moreover, the Judge implied the results from a drug test were not admissible for proving claimant's alleged impairment as the evidence failed to prove respondent had probable cause to believe claimant used, possessed or was impaired by marijuana while working. The Order reads in pertinent part:

The Respondent is using a defense pursuant to K.S.A. 44-50(d)(2) *[sic]* use of marijuana which reads:

“ . . . The results of a chemical test shall not be admissible evidence to prove impairment unless the following conditions were met: (A) There was probable cause to believe that the employee used, had possession of, or was impaired [by] the drug or alcohol while working; . . . ”

This requirement of probable cause is lacking.

At the October 31, 2006, preliminary hearing, however, the Judge indicated the drug testing results should not be admitted into evidence to prove claimant's alleged impairment as the parties had failed to prove the specific elements that are required by the Workers Compensation Act.<sup>1</sup>

Respondent and its insurance carrier contend Judge Clark erred. They argue respondent had a written, mandatory drug testing policy in effect before claimant's accident, which replaces or satisfies the probable cause requirement. Consequently, they argue the drug test results are admissible and establish that claimant's marijuana level at the time of the accident exceeded the minimum threshold to establish a conclusive presumption of impairment. Accordingly, respondent and its insurance carrier request the Board to reverse the Order and deny claimant's request for workers compensation benefits.

Conversely, claimant contends the Order should be affirmed. Claimant does not dispute that drug testing was done pursuant to respondent's policy. But claimant contends respondent and its insurance carrier did not satisfy the requirements for admitting the results of a drug screen. Moreover, claimant argues respondent and its insurance carrier failed to prove his alleged marijuana use contributed to his accident.

Although the parties in their briefs to the Board focused on the issues surrounding the admissibility of the drug testing results and whether the evidence established a link between the alleged marijuana use and the accident, the first issue that should be addressed is whether the Board has the authority or jurisdiction in an appeal of a preliminary hearing order to review an evidentiary ruling.

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

After reviewing the record compiled to date and considering the parties' arguments, the undersigned Board Member finds and concludes this appeal should be dismissed.

Claimant alleges that on April 21, 2006, he was standing on top of a bin loaded with scrap steel when a forklift bumped the heavy piece of steel he was holding, which knocked him off the bin and caused him to fall six or seven feet to the ground. According to claimant, he reached the ground shortly before the 200- to 400-pound piece of steel that he had been holding struck him.

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<sup>1</sup> P.H. Trans. at 37.

A co-worker promptly took claimant to a local hospital emergency room where he received stitches for a facial laceration and where he requested an MRI. The emergency room released claimant to return to work.

As indicated above, claimant does not challenge that respondent has a policy requiring drug testing when there is an accident. Accordingly, claimant provided a urine sample the evening of his accident.

Claimant testified that within days of the accident he quit his job with respondent, where he had worked since September 2000, as he felt the work was too dangerous. On the other hand, respondent's human resources manager testified that even though he was not there at the time it was his understanding that claimant was automatically terminated because he had failed his drug screening.

Respondent and its insurance carrier contend the drug testing results indicate claimant had used marijuana and that those test results establish a conclusive presumption that claimant was impaired at the time of the accident. Conversely, claimant testified that he had not used marijuana in the last 10 years.

This is an appeal of a preliminary hearing order. Therefore, the Board's jurisdiction to review preliminary hearing findings is limited. At this stage of the claim, not every alleged error is subject to review. Generally, the Board can review preliminary hearing orders in which an administrative law judge has exceeded his or her jurisdiction.<sup>2</sup> Moreover, the Board has specific authority to review the preliminary hearing issues listed in K.S.A. 44-534a, which are:

- (1) did the worker sustain an accidental injury,
- (2) did the injury arise out of and in the course of employment,
- (3) did the worker provide the employer with timely notice and with timely written claim, and
- (4) do certain other defenses apply.

The term "certain defenses" refers to defenses that dispute the compensability of the injury under the Workers Compensation Act.<sup>3</sup>

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<sup>2</sup> K.S.A. 2005 Supp. 44-551(b)(2)(A).

<sup>3</sup> *Carpenter v. National Filter Service*, 26 Kan. App. 2d 672, 994 P.2d 641 (1999).

The issue whether drug testing results should be admitted into evidence at a preliminary hearing is not a jurisdictional issue listed in K.S.A. 44-534a that is subject to review in an appeal of a preliminary hearing order. Moreover, there is no question an administrative law judge has the authority to make evidentiary rulings at a preliminary hearing.

Jurisdiction is defined as the power of a court to hear and decide a matter. The test of jurisdiction is not a correct decision but a right to enter upon inquiry and make a decision. Jurisdiction is not limited to the power to decide a case rightly, but includes the power to decide it wrongly.<sup>4</sup>

In addition, the undersigned agrees with claimant's contention that respondent and its insurance carrier have not established a link between claimant's alleged marijuana use and the accident. Claimant's testimony is uncontradicted that he was knocked off the pile of scrap steel when a forklift bumped the piece of steel he was holding and spun him to the ground. The forklift driver could not refute that testimony as he did not see what actually happened. But the co-worker agreed it was dangerous work. Claimant's testimony the forklift bumped the heavy piece of steel he was holding and knocked him to the ground is credible as something set the steel in motion and caused it to fall from the bin. Accordingly, even if the drug test results were to be admitted into evidence, it is questionable whether claimant's alleged marijuana use contributed to the accident. And the Workers Compensation Act requires contribution before the use or consumption of alcohol, drugs or other substances is a viable defense.<sup>5</sup>

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.<sup>6</sup> Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2005 Supp. 44-551(b)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

**WHEREFORE**, the undersigned Board Member dismisses respondent and its insurance carrier's appeal.

**IT IS SO ORDERED.**

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<sup>4</sup> *Allen v. Craig*, 1 Kan. App. 2d 301, 303-304, 564 P.2d 552, rev. denied 221 Kan. 757 (1977).

<sup>5</sup> K.S.A. 2005 Supp. 44-501(d)(2).

<sup>6</sup> K.S.A. 44-534a.

Dated this \_\_\_\_ day of January, 2007.

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BOARD MEMBER

c: Robert R. Lee, Attorney for Claimant  
Tracy M. Vetter, Attorney for Respondent and its Insurance Carrier  
John D. Clark, Administrative Law Judge